

**United States Department of Labor
Employees' Compensation Appeals Board**

TAUCHA M. STEWART, Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Memphis, TN, Employer**

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**Docket No. 05-262
Issued: April 1, 2005**

Appearances:
Leo Spann, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 4, 2004 appellant filed a timely appeal of the December 11, 2003 merit decision of the Office of Workers' Compensation Programs, which denied her claim for an employment-related emotional condition. She also timely appealed the Office's January 28, 2004 nonmerit decision denying reconsideration and the August 2, 2004 decision denying her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; (2) whether the Office properly denied appellant's request for a review of the merits of her claim pursuant to 5 U.S.C. § 8128(a); and (3) whether the Office properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On October 20, 2003 appellant, then a 34-year-old mail handler, filed an occupational disease claim for “post-traumatic injury stress.” She identified July 25, 2001 as the date she first became aware of her illness and September 25, 2003 as the date she first realized her illness was caused or aggravated by her employment. In an attached statement dated October 3, 2003, appellant indicated that she sustained work-related injuries to her right upper extremity on October 26, 1999 and July 25, 2001. The latter injury was reportedly accepted for right shoulder strain. Following the second injury, appellant had a hard time getting back up to speed and she frequently became ill and experienced migraine headaches. She became discouraged because she could not advance her career due to her injury and did not receive a performance award. Appellant claimed that supervisors made her feel worthless and nonproductive because of her injury and Gerald Rutherford, a supervisor, commented that her job was easy and a no-brainer. The remarks irritated her and made her feel alienated from the rest of the workforce. She sought counseling from the Employee Assistance Program (EAP) and her personal physician reportedly diagnosed depression and post-traumatic stress.

In a report dated October 14, 2003, Dr. Marcia R. Bowden, an internist, indicated that appellant had work-related shoulder impingement and tendinitis. Following her return to work, she experienced stress exacerbated migraines, which led to cervical strain and a worsening of her preexisting condition. Dr. Bowden also noted that while appellant was normally well controlled and pleasant, she demonstrated uncharacteristic behavior that could only be related to the chronic pain and stress of the job situation.

On October 31, 2003 the Office asked the employing establishment to comment on appellant’s allegations and provide information about her job duties, her performance and what, if any, accommodations were made to reduce stress.

On October 31, 2003 the Office asked that appellant provide a detailed description of her employment-related conditions and the incidents she believed contributed to her illness. The Office also requested that she submit a comprehensive medical report from her treating physician.

The employing establishment responded on November 10, 2003, noting that appellant had been accommodated since her July 25, 2001 injury. Her duties required that she time and date mail, rewrap mail and sort loose mail in accordance with her medical restrictions. The employing establishment also stated that appellant was allowed to sit, stand, write and work at her discretion.

Kisha Y. Jones, appellant’s supervisor, responded on November 6, 2003. She had been appellant’s supervisor since September 22, 2003 and did not have any knowledge of events regarding her claims prior to that date. Ms. Jones described appellant’s physical restrictions and her limited-duty assignment and stated that she was able to perform her duties in accordance with expectations. She also stated that there were no performance or conduct problems and she was unaware of any stress on appellant until she filed her claim.

Bertrand M. Tate, an employing establishment manager, indicated on November 9, 2003 that appellant had received a certificate of appreciation on August 2, 2003. He also noted that she had not mentioned anything to him concerning stress. Mr. Tate stated that appellant received a letter of warning on August 23, 2003 for unscheduled absences. He attributed her absence to Family and Medical Leave Act conditions, but not stress. When appellant asked how she could receive an award, Mr. Tate told her she would have to exceed her work expectations and not merely meet them. He stated that this was a standard applicable to all employees and not just limited-duty personnel.

On December 3, 2003 the Office received a copy of appellant's September 28, 2003 request for her EAP records. The Office also received a copy of the October 31, 2003 development letter it sent to her, but there was no specific response to the questions posed by the Office.

The Office also received a November 24, 2003 excuse slip from Dr. Bowden, indicating that appellant was seen that day and she was unable to return to work.

In a decision dated December 11, 2003, the Office denied appellant's claim because she failed to establish that she sustained an injury. The Office noted that she did not provide sufficient evidence to establish any compensable factors of employment.

Appellant requested reconsideration on December 22, 2003, contending that she had already described the employment-related conditions and injury that contributed to her claim. She submitted medical documentation, which included treatment records from her EAP counselor, Dr. Joyce L. Young, a Board-certified psychologist.

By decision dated January 28, 2004, the Office denied appellant's request for reconsideration. The Office noted that her claim had previously been denied because she failed to submit a detailed statement explaining the work factors she believed caused or contributed to her condition. The medical evidence submitted on reconsideration was deemed irrelevant to the issue on reconsideration.

On June 4, 2004 appellant requested an oral hearing. The Office's Branch of Hearings and Review denied the request on August 2, 2004 noting that she was not entitled to a hearing as a matter of right because she had previously requested reconsideration. The hearing representative noted that a discretionary hearing would not be provided because the issue in the case could equally well be addressed by appellant requesting reconsideration and submitting evidence establishing that she sustained an injury, as alleged.

LEGAL PRECEDENT -- ISSUE 1

To establish that she sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric

disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors.¹

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless, does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.² Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.³

ANALYSIS -- ISSUE 1

The Office denied appellant's claim for an emotional condition because she did not provide sufficient factual evidence to establish the compensable employment factors or incidents alleged to have caused or contributed to her condition. An October 3, 2003 statement described her general malaise and depressed mood that coincided with her return to limited duty following a July 25, 2001 right shoulder injury. Appellant noted severe sinus problems, swollen glands and migraine headaches and that she could not regain her normal energy level. She became discouraged because she did not advance her career due to her injury and did not receive a performance award. Appellant alleged that supervisors made her feel worthless and nonproductive because of her injury and Mr. Rutherford allegedly stated that her job was easy and a no-brainer.

When the Office asked appellant to provide a more detailed account of the specific employment incidents that caused or contributed to her condition, she failed to respond. Her allegation that supervisors made her feel worthless and nonproductive is too vague to be considered a compensable factor. While appellant identified Mr. Rutherford by name, she failed to provide details as to time, place or any other relevant information regarding any comments. She has not established verbal abuse in this case.

Appellant stated that given her physical limitations, she thought it was unfair that she had to do more work to receive a performance award. Mr. Tate acknowledged that he told her that she needed to do more than what was normally expected to receive an award, however, this requirement was applicable to all employees. Her emotional reaction to not receiving a performance award or the lack of opportunities for advancement is not covered under the Federal

¹ See *Kathleen D. Walker*, 42 ECAB 603 (1991). Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

² *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Ruthie M. Evans*, 41 ECAB 416 (1990).

Employees' Compensation Act. An employee's frustration from not being permitted to work in a particular environment or hold a particular position is not compensable.⁴

As appellant failed to establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence, the Office properly denied her claim for an employment-related emotional condition.⁵

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.⁶ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁷ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS -- ISSUE 2

Appellant's December 22, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).⁹

Appellant also failed to satisfy the third requirement under section 10.606(b)(2).¹⁰ The issue on reconsideration was whether she established a compensable factor of employment. Appellant did not submit any additional factual information with her December 22, 2003 request for reconsideration. She stated that she had already described to the best of her ability the employment-related conditions to which she attributed her claim. Dr. Young's treatment records are not relevant to the issue on reconsideration. Consequently, because appellant did not submit

⁴ *Lillian Cutler, supra* note 2.

⁵ *Ruthie M. Evans, supra* note 3.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2) (1999).

⁸ 20 C.F.R. § 10.608(b) (1999).

⁹ 20 C.F.R. §§ 10.606(b)(2)(i) and (ii) (1999).

¹⁰ 20 C.F.R. § 10.606(b)(2)(iii) (1999).

any relevant and pertinent new evidence, she is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).¹¹

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied the December 22, 2003 request for reconsideration.

LEGAL PRECEDENT -- ISSUE 3

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted in writing, within 30 days of the date of the decision for which a hearing is sought.¹² If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. Office regulations further provide that the “claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.”¹³ Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.¹⁴

ANALYSIS -- ISSUE 3

The Office denied reconsideration on January 28, 2004 and she filed a hearing request on June 4, 2004. Because appellant had requested reconsideration prior to requesting a hearing, she is not entitled to a hearing as a matter of right. In its August 2, 2004 decision, the Office denied her request for a discretionary hearing on the grounds that the pertinent issue could be addressed by requesting reconsideration and submitting additional relevant evidence. This is a proper exercise of the Office’s discretionary authority.¹⁵ There is no evidence in the case record to establish that the Office otherwise abused its discretion in denying appellant’s hearing request. Accordingly, the Board finds that the Office properly exercised its discretion in denying her request for a hearing.

CONCLUSION

The Board finds that appellant failed to establish that she sustained an emotional condition in the performance of duty. Additionally, the Office properly denied her request for reconsideration and her request for an oral hearing.

¹¹ *Id.*

¹² 20 C.F.R. § 10.616(a) (1999).

¹³ *Id.*

¹⁴ See *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁵ *Mary B. Moss*, 40 ECAB 640, 647 (1989).

ORDER

IT IS HEREBY ORDERED THAT the August 2, January 28, 2004 and December 11, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 1, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member